Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MIGUEL RICHARDSON,
Petitioner,

v.

GARY L. JOHNSON, Director,
Texas Department of Criminal Justice,
Institutional Division,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether petitioner's death sentence violates *Penry* v. *Lynaugh*, 492 U.S. 302 (1989), because the trial court's refusal to give a separate mitigation instruction unconstitutionally precluded trial counsel from presenting compelling mitigating evidence of childhood physical and sexual abuse and also precluded the jury from giving effect to the mitigating evidence that was presented.

2. Whether this Court's ruling in *Gray* v. *Mississippi*, 481 U.S. 648 (1987), was violated when the admittedly erroneous excusal of a juror who had been qualified to serve under *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968), was ruled on direct appeal to be harmless error.

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RULE

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Petitioner Miguel A. Richardson respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case, dated January 23, 2001.

OPINIONS BELOW

The panel opinion of the Court of Appeals affirming the United States District Court for the Western District of Texas' denial of a certificate of appealability ("COA") is unpublished and can be found at pages 2 to 12 of the Appendix. This decision is unofficially reported at 2001 U.S. App. LEXIS 1621 (5th Cir. Jan. 23, 2001) and the unpublished opinion is attached. (App. 2-12) The unpublished opinion of the district court denying federal habeas corpus relief and a COA can be found at pages 17-186 of the Appendix. The unpublished opinion of the district court denying petitioner's motion to alter or amend the judgment is also attached. (App. 13-16)

The order and opinion of the Texas Court of Criminal Appeals ("CCA") adopting the recommended findings of fact and conclusions of law of the 175th District Court, Bexar County, Texas, and denying a post-conviction writ of habeas corpus is not officially reported. (App. 289-95) The district court's opinion is unpublished. (App. 445-79)

On direct appeal, this Court *twice* granted *certiorari*, vacated the judgment and sentence, and remanded to the CCA. *Richardson* v. *Texas*, 509 U.S. 917 (1993); *Richardson* v. *Texas*, 492 U.S. 914 (1989). The opinion of the CCA upon the second remand is reported at 901 S.W.2d 941 (Tex. Crim. App. 1994). (App. 189-96) The order of the CCA denying Mr. Richardson's subsequent motion for rehearing is unpublished and appears on the court's docket sheet. (App. 480-86) The opinion of the CCA upon the first remand is reported at 886 S.W.2d 769 (Tex. Crim. App. 1991).

(App. 197-226) The order of the CCA denying Mr. Richardson's subsequent motion for rehearing is unpublished and appears on the court's docket sheet. (App. 480-86) The opinion of the CCA on direct appeal is reported at 744 S.W.2d 65 (Tex. Crim. App. 1987). (App. 229-88) The order of the CCA denying Mr. Richardson's subsequent motion for rehearing is unpublished and appears on the court's docket sheet. (App. 480-86)

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its judgment on January 23, 2001. This petition is being timely filed within 90 days of that judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1993). Petitioner first invoked federal jurisdiction in this case in 1998 under 28 U.S.C. § 2254 (1994).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

This case involves the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The text of these amendments is set forth at pages 187 to 188 of the Appendix. This case also involves section 19.03 of the Texas Penal Code and articles 35.16(a)(10) and 37.071(b) of the Texas Code of Criminal Procedure, as it existed in 1981. The text of these provisions is set out at pages 296-300 of the Appendix.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This case comes before this Court for a fifth time due to the persistent refusal of the Texas courts on remand to follow the mandate set forth in *Penry* v. *Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*"). In the *Penry* case itself, the Texas courts ignored this Court's specific instructions, leading to the recent grant of *certiorari* and argument in that case for a second time. *Penry* v. *Johnson*, 121 S. Ct. 563 (2001) ("*Penry II*"). The Texas courts have likewise ignored the basic reasoning of *Penry I* in this case. At trial, Petitioner presented sufficient mitigating evidence that this Court *twice* remanded the case to the Texas Court of Criminal Appeals for reconsideration in light of *Penry I* and its progeny. Both times, however, the CCA majority marginalized the mitigating evidence of Petitioner's character and background which clearly warranted reversal under *Penry I*. Moreover, on both remands, the CCA refused to consider the fact that the absence of a *Penry*-type instruction had deterred trial counsel from developing and presenting additional compelling evidence of childhood physical and sexual abuse — evidence finally adduced at the state habeas hearing — which Petitioner had a right to have the jury consider as mitigating.

As the state habeas record shows (App. 400-39), Petitioner endured a violent childhood during which he was subjected to physical and sexual abuse. He was brutally beaten by his father, who also threatened him with guns and stabbed him as punishment for having taken a nap in the nude. He was also sexually and physically abused by his older sister and his older brother.

The trial jury never heard any of this evidence, because, as shown below, trial counsel was unconstitutionally

impeded from presenting it. Nor was the jury able to give effect to the mitigating evidence it did hear, which painted a picture of a complex, flawed individual as opposed to the vicious criminal depicted by the State. The jury heard evidence that Petitioner had a troubled childhood, was subject to racial tensions and violence in the Oklahoma City schools in the early 1970s, and left home at an early age. (App. 331-40) In addition, several ministers testified that Mr. Richardson had come to a profound understanding of the Bible and Christian teachings and had shared that religious conviction with others by, among other things, assisting other prisoners with Biblical studies (App. 352-54; 363-65) Petitioner's religious devotion was further evidenced by his drawings, which often reflected religious symbols and ideas (App. 343-44) Petitioner's faith inspired him to help a young girl with serious medical problems and suicidal tendencies, sharing poetry, artwork, letters and phone calls. Other witnesses testified that their lives had been similarly enriched by reading Petitioner's poetry and viewing his inspirational artwork. (App. 343-44; 347-48; 366-68)

Despite trial counsel's request for precisely the kind of mitigation instructions later required by *Penry I*, the jury retired with only the same three special issues which *Penry I* held insufficient to permit a jury to give mitigating effect to such evidence. Moreover, the jury never heard the compelling evidence of childhood abuse, because trial counsel — as he himself testified on state habeas (App. 379-87) — was stymied by the State's announced plan to call the notorious Dr. James Grigson as a witness. From experience, trial counsel knew two things: (1) that any evidence he put forth about childhood abuse would be argued by the prosecution as supporting Dr. Grigson's one-size-fits-all diagnosis of anti-social personality disorder; and (2) that there would be no *Penry*-type instruction telling the jury it could give independent *mitigating* effect to such evidence. As a

result, trial counsel was chilled from developing that evidence and Petitioner was sentenced to die by a jury that heard nothing about his childhood abuse, and was also never told how it could give mitigating effect to the evidence it did hear.

Two remands by this Court during direct appeal, and the fractured decisions of the courts since then, demonstrate that a jury presented with a full picture of Petitioner's background and character may well have spared his life. Petitioner's initial direct appeal produced three dissents on the CCA. *See Richardson* v. *State*, 744 S.W.2d 65, 85-86 (Tex. Crim. App. 1987) (en banc). When this Court remanded the case to the CCA for reconsideration in light of *Penry I, see Richardson* v. *Texas*, 492 U.S. 914 (1989), Petitioner asserted each of the points raised in this Petition, but the Texas court re-affirmed the death sentence, again over two dissents. *See Richardson* v. *State*, 886 S.W.2d 769, 777-79 (Tex. Crim. App. 1991) (en banc). The dissenting judges wrote that the "majority has not assimilated the basic holding in *Penry* that a capital jury must be empowered to effectuate any evidence that has mitigating potential that cannot be *fully* accommodated within the jury's response to [the] special issues." 886 S.W.2d at 777 (Clinton, J., dissenting) (emphasis in original). Two years later, still on direct appeal, this Court again remanded this case to the CCA for reconsideration in light of *Johnson* v. *Texas*, 509 U.S. 350 (1993), *Richardson* v. *Texas*, 509 U.S. 917 (1993), but the Texas court again affirmed. *Richardson* v. *State*, 901 S.W.2d 941 (Tex. Crim. App. 1994) (en banc). The dissenting judge succinctly highlighted the majority's failure to follow *Penry I*, noting that Richardson had "presented at least marginally colorable evidence of a disadvantaged background," which had "no mitigating significance within the scope of the statutory special issues," and thus required a separate *Penry*-type instruction. 901 S.W.2d at 942 (Clinton, J., dissenting).

Moreover, on both remands, the CCA refused to consider the main argument presented here — that Petitioner's trial counsel had been unconstitutionally deterred by the lack of a *Penry*-type instruction from developing the child abuse evidence. Petitioner filed a third petition for *certiorari* to the CCA, which this Court denied on June 26, 1995. *Richardson* v. *Texas*, 515 U.S. 1162 (1995).

On collateral review, both the state habeas courts and the lower federal courts again misapplied *Penry I*, as they did in *Penry II*. On Petitioner's timely petition for a writ of *habeas corpus*, the Bexar County District Court held a five-day evidentiary hearing, at which it heard *both* the compelling evidence of child abuse *and* how trial counsel had been chilled from presenting it. But the court denied habeas relief on October 1, 1997 (App. 445-79), as did the CCA on June 10, 1998 over two dissents. (App. 289-95) On September 8, 1998, Petitioner filed a timely petition with this Court for a writ of *certiorari*, which was denied on November 30, 1998. *Richardson* v. *Texas*, 525 U.S. 1021 (1998).

On October 8, 1998, Mr. Richardson filed his first federal petition for a writ of *habeas corpus* in the District Court for the Western District of Texas. On March 28, 2000, District Judge Biery issued a 158-page opinion denying relief and a Certificate of Appealability. (App. 17-186) Petitioner's timely motion to alter and amend judgment was denied on April 16, 2000. (App. 13-16) On August 23, 2000, Petitioner filed an Application for a Certificate of Appealability in the United States Court of Appeals for the Fifth Circuit, which was denied on January 23, 2001. *See Richardson* v. *Johnson*,

No. 00-50418, 2001 U.S. App. LEXIS 1621 (5th Cir. Jan. 23, 2001). (App. 1-12)[1]

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[1] In addition to the *Penry* issue, Petitioner also asserts misapplication of this Court's decision in *Gray* v. *Mississippi*, 481 U.S. 648 (1987). As we show below (pp. 20-28), the decision of the CCA on appeal and of the Fifth Circuit on federal habeas opened a gaping loophole in the *Gray* v. *Mississippi* rule that the erroneous exclusion of *Witherspoon*-qualified jurors can never be harmless error, by permitting harmless-error analysis to excuse the erroneous exclusion of such jurors on some other pretext not relating to the juror's *Witherspoon* qualifications.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT BELOW CONFLICTS WITH *PENRY I*

The Fifth Circuit, as well as the District Court and the state habeas courts, violated the constitutional principle of *Penry I* because Richardson's trial counsel, expecting the testimony of Dr. Grigson and knowing he would not get an instruction telling the jury how to address mitigating factors, was effectively precluded from developing available evidence of childhood physical and sexual abuse. For these reasons, the Fifth Circuit decided the question "in a way that conflicts with relevant decisions of this Court." SUP. CT. R. 10(c) — *i.e.*, it improperly applied *Penry I* in this case, much as it did in *Penry II*.

This Court held in *Penry I* that Texas juries must be separately instructed that they can consider and give effect to any mitigating evidence about the defendant's "background *or* character *or* the circumstances of the crime" that is *either* (1) "*not* relevant to the special verdict questions" or (2) has "relevance to the defendant's moral culpability *beyond the scope* of the special verdict questions." *Penry*, 492 U.S. at 321 (quoting *Franklin* v. *Lynaugh*, 487 U.S. 164, 185 (1988) (O'Connor, J., concurring) (emphasis added)). The Court held that Penry's mitigating evidence of mental retardation and childhood abuse was relevant to the first special issue (deliberateness), but that "it *also* 'had relevance to [his] moral culpability beyond the scope of the special verdict questio[n].'" *Id.* at 322 (quoting *Franklin*, 487 U.S. at 185 (alternation in original) (emphasis added)). Moreover, such evidence was a "two-edged sword," because it was relevant to the second special issue ("future dangerousness") "only as an aggravating factor," suggesting a likelihood of future violent acts, while at the same time serving to "diminish his

blameworthiness for his crime." *Id.* at 323-34 (emphasis omitted). For both of these reasons, this Court concluded that a separate instruction was necessary in order to "provide a vehicle for the jury to give mitigating effect" to that evidence. *Id.* at 324, 328.

Unlike *Graham* v. *Collins*, 506 U.S. 461 (1993) and *Johnson* v. *Texas*, 509 U.S. 350 (1993), in which this Court distinguished *Penry*, the critical mitigating evidence in this case — a disadvantaged background, including child abuse — falls squarely within the *Penry I* rule. *See Graham*, 506 U.S. at 474 ("it was impossible to give meaningful mitigating effect to Penry's evidence by way of answering the special issues"). As recognized by Judge Clinton of the CCA in dissenting on the second remand, Petitioner's "evidence of a disadvantaged background . . . has no mitigating significance within the scope of the statutory special issues. Thus, the holding of *Johnson* is not implicated." *Richardson* v. *State*, 901 S.W.2d 941, 943 (1994) (Clinton, J., dissenting). Moreover, the effects of child abuse, unlike the evidence of youth at issue in *Johnson* and *Graham*, are not "transient," and are thus beyond the reach of the special issues. As the *Johnson* Court noted, "*Penry* remains the law and must be given a fair reading." *Johnson*, 509 U.S. at 369. As demonstrated below, such a "fair reading" of *Penry I* mandates a reversal here.[2]

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[2] The plurality opinion in *Jurek* v. *Texas*, 428 U.S. 262 (1976), does not change the result here. As a majority at this Court stated in *Penry I*, in *Jurek*, "both the concurrence and the dissent understood *Jurek* as resting fundamentally on the express assurance that the special issues would permit the jury to fully consider the mitigating evidence a defendant introduced" in answering the special issues. *Penry I*, 492 U.S. at 321. "Moreover, both the concurrence and the dissent stressed that 'the right to have the sentencer consider and weigh relevant mitigating evidence would be meaningless unless the sentencer was

A. The Unconstitutional Constraints Placed on Trial Counsel

This Court is by now quite familiar with the three special questions contained in the Texas statute in effect at Petitioner's trial. TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon 1981) (App. 296-97). In most cases, the ability of a jury to give effect to mitigating evidence was limited by the scope of the first two questions to the deliberate nature of the crime and to future dangerousness. Richardson's trial counsel, well aware of these limitations, proposed *five separate mitigation instructions* of the type later endorsed in *Penry I* (App. 301-10), but — as trial counsel fully expected (App. 382) — the trial court rejected them and merely told the jury that it could consider all of the evidence presented. (App. 314-16)

Trial counsel knew not only that he would not get a supplemental instruction, but also that the notorious Dr. James Grigson would testify for the State. (App. 384) As trial counsel testified at the state habeas hearing, Dr. Grigson

> was very well known to the defense bar in Texas at that time. He testified in many capital murder cases, invariably for the prosecution. He was a particularly effective witness for the State . . . [who] would invariably testify that he diagnosed the individual as having what is known as antisocial personality conduct disorder. He would go on to testify that that

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also permitted to give effect to its considerations in imposing sentence". *Id.* (quoting *Franklin* v. *Lynaugh*, 487 U.S. 164, 185 (1988) (O'Connor, J., concurring)). The "express assurance" of *Jurek* was not fulfilled here because the jury was not able to "consider and weigh mitigating evidence."

> was an incurable condition . . . in other words, testimony in support of the future dangerousness question that was being submitted to the jury. (App. 384-85)

Trial counsel therefore knew that Dr. Grigson "would testify that child abuse was a predisposing factor, or one of the diagnostic criteria for antisocial personality conduct disorder," (App. 385) and, knowing there would be no instruction on how the jury could give that same evidence mitigating effect, he was "afraid that that type of evidence would only support Dr. Grigson's diagnosis. And for that reason, we didn't pursue that area." Had the court granted his request for a *Penry*-type instruction, trial counsel testified at the state habeas hearing, he would have approached the penalty phase differently and "would have been more conscious about developing evidence of child abuse and/or mental retardation." (App. 391)

B. The Mitigating Evidence Trial Counsel Was Chilled From Presenting

At the state habeas hearing, Richardson was finally able to present the powerful mitigating evidence that his trial counsel was clearly chilled from developing by the combination of the spectre of Dr. Grigson and the trial court's rejection of his requested *Penry*-type instructions. At the habeas hearing, Mr. Richardson's brother Julio testified that Mr. Richardson was subject to whippings and beatings by his father "at least twice a week or more," with a two-by-four, a rubber garden hose, a hose used for pumping oil or gas, a razor strap — or sometimes "he would just cut a switch off a tree." According to Julio, the injuries inflicted by his father were so severe that Mr. Richardson still has three "whelps on his behind" as a result of the beatings many years ago. And if the boy tried to escape these beatings, his father "tied him to a

clothesline pole." (App. 407-08) Julio also recalled that their father continually did things just to "scare" the children. (App. 409) For example, "he would like shoot his gun off or something to make [them] listen." And Julio recounted this incident in which their father stabbed Miguel — merely because he took a nap in the nude:

> [M]y dad don't like us to sleep without shirts on or underwear on or something. We couldn't sleep without, you know, something on. And one day Miguel was sleeping in the nude, you know. We had bunk beds. And my dad, I told my dad, I said, "Dad, Miguel is sleeping with no clothes on." So my dad went in there and started whipping on him. . . . My dad went and got a gun, a pistol. I think it was a .38, I don't know. It was a big round gun, like it was a revolver. He told him he was going take this whipping, or you're going to take this gun. And somewhere after that, I remember that Miguel just got stabbed. Well, at first what he did, he said, "You are going to act like a nigger on the street," he said, "I'm going to treat you like one." At that time, he pushed Miguel on the shoulder and put a knife on his neck like that. And he said, "Don't move, nigger." And then — and then — (pause) Miguel was sitting on the dresser with blood on the dresser.

(App. 410; *see also* App. 411) Julio also testified that his "father stabbed [Petitioner] one time in the behind with probably a six-inch knife, maybe a half or maybe a fourth of it." (App. 407)

Often, abused children are able to find comfort in each other's arms, but instead Miguel was physically and sexually abused by his older siblings. Julio recounted a day when the two younger boys were taken separately into a bathroom by

their sister Lolita, under the pretense of giving them a bath, and forced "to suck on her private." (App. 415-16) Lolita's abuse of Miguel was physical as well as sexual. Julio testified that "Lolita didn't like him. She always hated him. And she used to slap him around, throw stuff at him. One time he put some hair grease all over my face, and she stomped on him about six or seven times until his nose started bleeding." (App. 416) In addition, Miguel's older brother, Petillio, "would slap him a lot" and "bust his mouth on the table, make his nose bleed several times." (App. 412)

It is immaterial to the issue presented here whether Julio Richardson's testimony, if presented to the trial jury, would have been believed or would have conclusively affected the sentencing decision. The point here is that Petitioner had a constitutional right for the jury to hear and consider that testimony, but his trial counsel was unconstitutionally deterred from developing and presenting it by his knowledge that, in the absence of his requested instruction, such evidence could only be used as an aggravating circumstance to support Dr. Grigson's opinion. As we now show, the combination of this "chilling effect" of the trial court's failure to give a *Penry*-type instruction *and* the jury's inability, in the absence of such an instruction, to give mitigating weight to the evidence it *did* hear, mandated reversal of Richardson's death sentence in light of *Penry I*. But the CCA on remand from this Court, as well as the state and federal courts on collateral review, simply misapplied *Penry I* in reaching the opposite result.

C. The Trial Court's Failure to Give a Mitigation Instruction Forced Trial Counsel to Withhold Compelling Mitigating Evidence

In *Lockett* v. *Ohio*, 438 U.S. 586 (1978), this Court held that a capital jury must be able to give "independent

mitigating weight" to all constitutionally relevant evidence about a defendant's "character or record" that was proffered "as a basis for a sentence less than death." 438 U.S. 604-05; *see also Franklin* v. *Lynaugh*, 487 U.S. 164, 184-85 (1988) (O'Connor, J., concurring) ("it is clear that a State may not constitutionally prevent the sentencing body from giving effect to evidence relevant to the defendant's background or character or the circumstances of the offense that mitigates against the death penalty"); *Eddings* v. *Oklahoma*, 455 U.S. 104, 110 (1982).

Applying the *Lockett* principle in *Penry I*, this Court held that the three special issues were constitutionally deficient when they prevented the jury from giving *full* effect to mitigating evidence before it such as retardation and child abuse. But a capital defendant's rights, under *Lockett* and *Eddings*, to have the jury consider and give mitigating effect to such evidence, are violated every bit as much when, as here, the limited scope of the special questions deterred trial counsel from ever developing such evidence. As Justice O'Connor stated in *Franklin*, "the principle underlying *Lockett, Eddings,* and *Hitchcock* [v. *Dugger*, 481 U.S. 393 (1987)] is that punishment should be directly related to the personal culpability of the criminal defendant." 487 U.S. at 184. And, as was stated in *California* v. *Brown*:

> [E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse . . . . Thus, the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime. . . .

479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis omitted).

Absent a complete picture of the defendant's background and character, a capital jury cannot express such a "reasoned moral response." Here, the jury never got that complete picture, because trial counsel was unconstitutionally inhibited from painting it.

In concurring in the 1991 judgment of the CCA on the remand by this Court, Judge Benavides recognized that: "[w]hen a child has been abused by his parents or by some other person in a position of trust or obligation toward him, he may have a greater tendency than normally reared children to develop an impaired conscience." 886 S.W.2d at 777 (Benavides, J., concurring). Thus, Judge Benavides correctly recognized that if there were "sufficient evidence to raise the issue that [Petitioner's] conscience was impaired because he was abused or betrayed as a child, and might therefore be somewhat less culpable for his criminal behavior as an adult," *Penry I* would have mandated "a jury instruction of the kind requested, or its functional equivalent." *Id.* Petitioner produced just such "sufficient evidence" at the state habeas hearing. Only the Texas courts' universal pre-*Penry* practice of refusing to give the very instruction later mandated in *Penry I* prevented trial counsel from developing and presenting that same evidence at trial.

The Fifth Circuit — echoing the district court's misconception of Petitioner's *Penry* claim — denied the claim "because Mr. Richardson cites no precedent stating that a trial judge erred by not giving a *Penry*-type instruction where there was nothing about which to instruct." (App. 9) However, Petitioner has never argued that a *Penry* instruction should have been given in the absence of mitigating evidence. As detailed above, he has consistently asserted that there

would have been compelling evidence of child abuse, but for the trial court's refusal to give a *Penry*-type instruction, which forced trial counsel to eschew developing that evidence.

The unconstitutional deterrence, or chilling, of trial counsel's ability to present relevant evidence is hardly a new concept. In the past, this Court has invalidated state statutes that placed limits on the mitigating evidence defense counsel could present. *See Hitchcock* v. *Dugger*, 481 U.S. 393 (1987). Relying on those decisions, the Supreme Courts of Florida and Arizona reversed death sentences where defense counsel had been effectively inhibited from presenting mitigating evidence because of the unconstitutional restrictions contained in state statutes. *Hall* v. *State*, 541 So. 2d 1125 (Fla. 1989) (per curiam); *State* v. *Evans*, 584 P.2d 1149 (Ariz. 1978) (in banc). In *Hall*, the Supreme Court of Florida ordered a new trial in light of this Court's decision in *Hitchcock*, because the "trial court limited the jury's and its own consideration to the statutorily enumerated mitigating circumstances." 541 So. 2d at 1126. Similarly, in *Evans*, defense counsel "did not attempt to present mitigating factors at the sentencing hearing" because at the time of the trial, Arizona had a statute that limited presentation of mitigating factors. 584 P.2d at 1153. Because counsel was "relying on the limitations on mitigating factors imposed" by the statute, the Arizona Supreme Court ordered a new trial so that defense counsel would not labor under restrictions on his ability to present mitigating evidence. *Id.*[3]

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[3] Moreover, even the CCA itself recognized, in *dicta*, that a claim that the pre-*Penry* Texas sentencing scheme unconstitutionally "chilled" the presentation of two-edged evidence "might be appropriate in a pre-*Penry* case." *Satterwhite* v. *State*, 858 S.W.2d 412, 428 (Tex. Crim. App. 1993) (en banc).

Each of these decisions recognized that where the law at the time of a defendant's trial puts restraints on his counsel's ability to present mitigating evidence, and such restraints are later invalidated by this Court, the defendant must be given a new trial free of such restraints. In failing to recognize that a new trial is likewise necessitated here by this Court's decision in *Penry I*, the decisions of the Fifth Circuit, the District Court, and the state habeas courts, are in conflict with *Hall* and *Evans*. In sum, this case presents a unique opportunity for this Court to decide the "*Penry*-chilling" issue on the full evidentiary record developed at Petitioner's state habeas hearing.[4]

D. The Mitigating Evidence Presented at Trial Was Beyond the Scope of the Special Issues

Petitioner's *Penry I* issue before this Court is not, of course, confined to the chilling argument. The mitigating evidence actually presented at trial fell outside the scope of the special issues or was "two-edged." The first question the jury answered related to the deliberateness of Mr. Richardson's conduct. As this Court explained in *Penry I*, this first special issue did not provide a vehicle for a capital jury to give effect to the type of mitigating evidence presented by Petitioner. The evidence at trial, of a troubled childhood, racial violence in school, religious devotion and kindness to others, "had relevance to [his] moral culpability

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[4] It is thus distinguishable from several lower court decisions rejecting the "*Penry*-chilling" argument in which this Court denied *certiorari*, where no such record had been developed of the actual evidence trial counsel had been chilled from presenting. *See, e.g., West* v. *Johnson*, 92 F.3d 1385, 1405 (5th Cir. 1996), *cert. denied*, 520 U.S. 1242 (1997); *Briddle* v. *Scott*, 63 F.3d 364, 370 (5th Cir. 1995), *cert. denied*, 516 U.S. 1033 (1995); *Allridge* v. *Scott*, 41 F.3d 213, 223 (5th Cir. 1994), *cert. denied*, 514 U.S.1108 (1995).

beyond the scope of the [first] special verdict questio[n]." 492 U.S. at 321. Indeed, the evidence demonstrating Mr. Richardson's religious devotion and ability to contribute to society while in prison had absolutely no bearing on the issue of whether his conduct at the time of the crime was deliberate.

Much of the mitigating evidence which the jury heard was also irrelevant, or at least "two-edged," with regard to the second special issue on future dangerousness. On the two remands from this Court, the CCA issued contradictory opinions on whether evidence of Petitioner's artistic and poetic talent could be "shoehorned" into the second special issue.[5] The truth is, as Judge Clinton noted in dissent on the second remand (901 S.W.2d at 943), that "artistic and poetic talent has [no] relevance whatsoever, aggravating or mitigating, to the issue of future dangerousness." And while the evidence of Petitioner's troubled childhood, and the racial violence he encountered in school, could be mitigating, it was "two-edged," because it could *also* have led the jury to conclude he would be violence-prone in the future. For these reasons, on the evidence that was already in the record, *Penry I* required that Petitioner be given a new trial at which the jury was given a *Penry*-type instruction.

On each of the remands to the CCA, and in state and federal habeas, the courts applied — as they did in the *Penry* case itself — what CCA Judge Clinton properly called a

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[5] The majority had held on the first remand that it could not "shoehorn appellant's artistic and poetic abilities into the ambit of the second special issue" 886 S.W.2d at 773. However, as Judge Clinton observed in his dissent on the second remand, the CCA turned completely around on the second remand, holding that "the jury could have used this evidence to answer 'no' to special issue two." 901 S.W.2d at 943.

"crabbed interpretation" of this Court's *Penry I* decision. As Judge Clinton wrote on the first remand in 1994:

> [T]he majority tacitly assumes throughout that as long as it can identify some sense in which that evidence might be said to militate in favor of a 'no' answer to one of the special issues, then it is not confronted with what it calls "*Penry* evidence." This assumption misses the very essence of the Supreme Court's holding. It may well be that the jury "had the opportunity to give effect "to a particular item of mitigating evidence within the parameters of the special issues. But should that evidence also have some potentially mitigating aspect not accountable under the special issues, we cannot say that special issues enable the jury to give it *full* consideration and effect. The jury must be empowered to give mitigating evidence all the effect to which it is susceptible before we can say the Eighth Amendment has been satisfied, consonant with the holding in *Penry*.

886 S.W.2d at 778 (internal citation and footnotes omitted).

E. Neither *Teague* Nor the AEDPA Bars Petitioner's Claim

Under *Teague* v. *Lane*, 489 U.S. 288, 301 (1989), "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal government." 489 U.S. at 301. A case does "not announce a new rule" when it is "merely an application of [a] principle that governed" an earlier decision. *Id.* at 307 (citation omitted). The *Penry I* Court specifically held that it was not announcing a new rule for purposes of *Teague*, but rather, the result there was "dictated by *Eddings* and *Lockett*." *Penry I*, 492 U.S. at 319. The AEDPA requires reversal where the

decision of a state court "was either (1) 'contrary to . . . clearly established Federal Law, as determined by the Supreme Court of the United States,' or (2) 'involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States.'" *Williams* v. *Taylor*, 529 U.S. 362, 404-405 (2000) (emphasis omitted) (quoting 28 U.S.C.A. § 2254(d)(1)). The "contrary to" and the "unreasonable application" clauses of the AEDPA are independent. In *Williams*, Justice O'Connor explained that "contrary to" means that "the state court's decision must be substantially different from the relevant precedent of this Court." *Williams*, 529 U.S. at 405. "A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases." *Id.*

In this case, *Teague* and AEDPA questions are in substance the same: Does the rule of *Penry I*, a rule not new at the time, but compelled by *Lockett* and *Eddings*, control the result here? The answer is yes. As demonstrated above, the result Petitioner seeks here follows inexorably from the *Lockett-Eddings-Penry* line of cases. Therefore, the rule Petitioner asks this Court to apply is not "new" for *Teague* purposes, and is not barred by AEDPA because the decisions of the CCA and Texas habeas courts were contrary to, or an unreasonable application of, federal law as established by those decisions of this Court.

II. THIS COURT'S RULING IN *GRAY* v. *MISSISSIPPI* IS EVISCERATED BY THE CCA'S HARMLESS-ERROR AFFIRMANCE OF THE ERRONEOUS EXCUSAL OF A *WITHERSPOON*-QUALIFIED JUROR

Petitioner's second claim presents an important federal issue respecting a capital defendant's fundamental

constitutional right to retain jurors whose doubts about capital punishment passed muster under this Court's decision in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968). That rule was designed to assure an impartial jury not "organized to return a verdict of death." *See Witherspoon*, 391 U.S. at 521. On direct appeal, the CCA violated this fundamental right by applying harmless error analysis — in flagrant disregard of *Gray* v. *Mississippi*, 481 U.S. 648 (1987) — to an admittedly erroneous exclusion of a *Witherspoon*-qualified juror on grounds not relating to the juror's *Witherspoon* qualifications. Each subsequent court to review this case has likewise disregarded *Gray*. Review by this Court is warranted because the Fifth Circuit's ruling opened a gaping loophole in this Court's *Gray* decision, and decided this issue contrary to the Florida Supreme Court's decision in *Farina* v. *State*, 680 So. 2d 392 (Fla. 1996), and prior Fifth Circuit law.

A. The Voir Dire

During *voir dire*, prospective juror William Noble stated that he was opposed to the death penalty, but despite those feelings, he could vote to impose a death sentence based on the law and evidence presented at trial. The State then challenged Mr. Noble for cause but, after further questioning by the court, Mr. Noble stated that he would be able to follow his oath and apply the law to the facts presented at trial. The trial court therefore properly overruled the challenge on the basis of *Witherspoon*.

The state continued examining Mr. Noble, who stated that he had "already prejudged the case" based on what he had read in the newspapers. (App. 326) The trial court asked Mr. Noble whether he had formed an opinion as to guilt or innocence. Upon Noble's affirmative answer, the court *sua sponte* excused him without asking whether that opinion would influence his verdict, as required by the Texas statute.

TEX. CODE CRIM. PROC. ANN. art. 35.16(a)(10) (Vernon 1966). Thus, the predicate for excusal under Texas law was not laid, and the exclusion of Mr. Noble was clear error. The defendant objected but the trial court overruled the objection.

On Petitioner's original direct appeal in 1987, the CCA agreed that exclusion of Mr. Noble constituted clear error under the Texas statute, but, *over three dissents*, held that the error was harmless because "the trial judge excused the venireman *sua sponte* rather than as the result of a challenge for cause by the State, thus depriving the State of the orderly opportunity to challenge peremptorily." 744 S.W.2d at 71. The Texas court neither cited nor considered this Court's decision in *Gray* v. *Mississippi*, decided five months earlier, which rejected harmless-error analysis for exclusion of *Witherspoon*-qualified jurors.

Mr. Richardson also raised this issue in his state and federal habeas petitions. The Texas habeas court failed to consider this issue in light of *Gray*; without addressing the merits, it denied the claim on the erroneous ground that it "was raised and decided adversely to Richardson on direct appeal" and therefore, "[could not] form the basis for relief in a post-conviction writ of habeas corpus." (App. 447)

On federal habeas, the district court and the Fifth Circuit below also failed to consider the *Gray* issue on the merits. The Fifth Circuit completely misapprehended Petitioner's argument in ruling that *Witherspoon* and *Gray* do not apply to this case because "[c]ontrary to Mr. Richardson's assertion that Noble was excused because he opposed the death penalty in violation of *Witherspoon*, Noble was in fact excused *sua sponte* by the trial court during *voir dire* because the court believed that he had already prejudged the case."

(App. 5-6)[6] But Petitioner has never asserted that Mr. Noble was excused based on his views about the death penalty; his argument has always been that the federal constitutional error here was in the *appellate* ruling that the trial court's admittedly erroneous exclusion of a *Witherspoon*-qualified juror on *different* grounds was harmless error.

B. The Erroneous Disqualification of a *Witherspoon*-Qualified Juror Could Not Be Harmless

In *Witherspoon*, this Court held that the Sixth Amendment right to an impartial jury forbids exclusion for cause of jurors opposed to the death penalty who confirm that such beliefs would not prevent or impair performance of their duties in accordance with their instructions. The importance of this ruling was made evident in this Court's subsequent decision in *Gray* — decided while Mr. Richardson's direct appeal was pending before the CCA. *Gray* held that the improper exclusion of a prospective juror under the *Witherspoon* rule can never be upheld as harmless error. *Gray*, 481 U.S. at 666-69. As the Court explained in *Gray*:

> Because the *Witherspoon-Witt*[7] standard is rooted in the constitutional right to an impartial jury, and because the impartiality of the adjudicator goes to the very integrity of the legal system, the *Chapman* [v. *California*, 386 U.S. 18 (1967)] harmless-error analysis cannot apply. We have recognized that

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[6] The district court had likewise characterized Petitioner's argument as being erroneously premised on an assumption that the trial court excluded Mr. Noble *because of his views on the death penalty* (App. 94) and on that incorrect basis, ruled that "the holding in *Gray* v. *Mississippi* is inapposite to this cause." (App. 98)

[7] *Wainwright* v. *Witt*, 496 U.S. 412 (1985).

> "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error." The right to an impartial adjudicator, be it judge or jury, is such a right. As was stated in *Witherspoon*, a capital defendant's constitutional right not to be sentenced by a "tribunal organized to return a verdict of death" surely equates with a criminal defendant's right not to have his culpability determined by a "tribunal 'organized to convict.'"

Id. at 668 (internal citations omitted).

The *Gray* holding was not new: it reaffirmed this Court's 1976 *per curiam* ruling in *Davis* v. *Georgia*, 429 U.S. 122 (1976) (per curiam), which "established a *per se* rule requiring vacation of a death sentence imposed by a jury from which a potential juror, who has conscientious scruples against the death penalty but who nevertheless under *Witherspoon* is eligible to serve, has been erroneously excluded for cause." *Gray*, 481 U.S. at 659, *citing Davis*, 429 U.S. at 123-124 (dissenting opinion).

In failing to even consider *Gray*, the Fifth Circuit violated Mr. Richardson's fundamental rights. The *Witherspoon* rule, given added force in *Gray*, ensures that a capital defendant is not sentenced by a jury predisposed to return a verdict of death, by requiring that jurors personally opposed to the death penalty may serve so long as they confirm their ability to perform their duties in accordance with the law. Because this right is "so basic to a fair trial," this Court held in *Gray*, the improper exclusion of a *Witherspoon*-qualified juror can *never* be upheld as harmless error. *Gray*, 481 U.S. at 668 (citation omitted).

But, if a *Witherspoon*-qualified juror can simply be excused on some other, admittedly erroneous ground — as Noble was here — and that excusal can then be upheld as

harmless error, there is nothing left of the *Gray* protection. Every time a venire person passes muster under *Witherspoon*, the prosecution need only find a different, although wholly erroneous, pretext for challenging that juror, secure in the knowledge that the error will be upheld as harmless. The wrongful exclusion of a *Witherspoon*-qualified juror by such a stratagem is every bit as prejudicial to a capital defendant's right to an impartial jury as if the *Witherspoon* challenge minutes before had been granted. Indeed, failure to apply *Gray* to facts such as these renders the rule of that case meaningless.

C. The Fifth Circuit's Holding Directly Conflicts With Decisions of this Court, the Florida Supreme Court and the Fifth Circuit Itself

The Fifth Circuit, erroneously believing that Petitioner's argument was based on the trial court's ruling, rather than the CCA's harmless error holding, concluded that "reasonable jurists would not find the district court's assessment of the alleged *Witherspoon* claim debatable or wrong." (App. 6) But "reasonable jurists" *have* found the harmless error analysis applied in the CCA's opinion to be debatable and wrong. The harmless error reasoning of the CCA, upheld by the Fifth Circuit here, was *expressly rejected* by this Court in *Gray*. *See Gray*, 481 U.S. at 664-66. *See also Bernette* v. *Illinois*, 403 U.S. 947 (1971), and decision below, 258 N.E.2d 793 (Ill. 1970); *Wigglesworth* v. *Ohio*, 403 U.S. 947 (1971), and decision below, 248 N.E.2d 607 (Ohio 1969). In addition, both the Fifth Circuit and the CCA itself, sitting *en banc*, had previously rejected the "unexercised peremptory" argument in death cases, because such a ruling effectively permits the retroactive exercise of preemptory challenges. *See Moore* v. *Estelle*, 670 F.2d 56, 57 (5th Cir. 1982); *Grijalva* v. *State*, 614 S.W.2d 420, 424-25 (Tex. Crim. App. 1980) (*en banc*). And, in this very case, three justices of

the CCA dissented *on this very point*. *See Richardson*, 744 S.W.2d at 85-86.[8]

Although the state and federal courts never reached the essence of Petitioner's *Gray*'s argument, prior decisions of the Supreme Court of Florida, and of the Fifth Circuit itself, have read the *Gray* rule against harmless-error analysis as not limited to the disqualification of a *Witherspoon*-qualified juror under *Witherspoon* itself.

In *Farina* v. *State*, 680 So. 2d 392 (Fla. 1996), the Florida Supreme Court vacated a death sentence on the strength of *Gray* v. *Mississippi*. In *Farina*, a venireperson named Hudson had been interrogated extensively about her reservations towards the death penalty and eventually passed muster under *Witherspoon*, indicating that she would give the imposition of the death penalty "a fair shake." *Id.* at 397. Later, the trial court disqualified Mrs. Hudson for cause without either the prosecution or the trial judge giving a clear

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[8] The CCA majority nevertheless held that *Grijalva* did not apply here, because the trial court acted *sua sponte* and there was, therefore, no need to "penalize" the state for gaining an unfair advantage. *Richardson*, 744 S.W.2d at 70-71. But, as this Court made clear in *Gray*, rejection of harmless error analysis in capital cases has nothing to do with the need to "penalize" prosecutors for asserting groundless challenges. Rather, "the relevant inquiry is 'whether the composition of the *jury panel as a whole* could possibly have been affected by the trial court's error,'" *Gray*, 481 U.S. at 665, *quoting Moore* 670 F.2d at 58 (emphasis in original). *See* 744 S.W.2d at 85-86 ("In *Grijalva*, no less than in the instant case, opportunity for the orderly conduct of peremptory challenges by both sides was preempted by erroneous excusal of the venireman by the trial court. That here that excusal was *sua sponte* does not invalidate the rationale of *Grijalva*. . . . Circumvention of the statutorily mandated order for the exercise of peremptory challenges in a capital case is just as manifest here as it was in *Grijalva*.") (Clinton, J., dissenting) (emphasis omitted).

explanation for why a for-cause challenge should be granted. In fact, the trial court merely indicated that it was doing so because it had just granted a defense challenge. *Id.* at 398. The Florida Supreme Court found that to be clear error and held that, because Hudson had passed muster under "the *Witherspoon-Witt* standard," *Gray* v. *Mississippi* dictated that "the erroneous exclusion of Hudson is *not subject to harmless error analysis,*" and accordingly, vacated the death sentence. *Id.* at 398-99 (emphasis added).

Similarly, in *Ellis* v. *Lynaugh*, 873 F.2d 830, 837 n.1 (5th Cir. 1989), the Fifth Circuit itself recognized that *Gray's* ban on harmless error analysis is not limited to the erroneous removal of a *Witherspoon*-qualified juror under *Witherspoon* itself. The precise issue in *Ellis* was whether the trial court's *questioning* of the prospective juror on his ability to follow his oath was improper conduct. 873 F.2d at 833. The Fifth Circuit held that it was not, but added in a footnote *citing Gray*, that "[w]ere we to conclude that the trial court engaged in impermissible conduct, *we would not be able to conclude*, as did the district court, *that such was harmless error*." *Id.* at 836, n.1 (emphasis added).[9]

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[9] It is of course true that, in *Ross* v. *Oklahoma*, 487 U.S. 81 (1988), this Court declined "to extend the rule of" *Gray* to embrace a trial court's erroneous *failure* to excuse a juror who was clearly *not* qualified under *Witherspoon*. But the Court's rationale shows why, as discussed above, the *Gray* ruling *does* apply when a juror who was qualified to serve under *Witherspoon* has been erroneously *excluded* on other grounds. Here, as in *Gray* (but not *Ross*), there is "the inability to know to a certainty whether the prosecution could and would have used a peremptory challenge to remove the erroneously excused juror." *Ross*, 487 U.S. at 88 (citing *Gray*, 481 U.S. at 665). Thus, Mr. Richardson, unlike Ross, was clearly denied his constitutional right to an impartial jury not "organized to return a verdict of death." *Gray*, 481 U.S. at 668 (quoting *Witherspoon*, 391 U.S. at 521).

D. Neither *Teague* Nor the AEDPA Forecloses the *Gray* Claim

The *Gray* claim is not barred by the *Teague* doctrine. For purposes of *Teague*, "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." 489 U.S. at 301. As this Court explained, "a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Id.* A case does "not announce a new rule" when it is "merely an application of [a] principle that governed" an earlier decision. *Teague*, 489 US. at 307 (citation omitted). As explained *supra* (p. 24), this Court in *Gray* made clear that its decision merely reaffirmed its prior holding in *Davis* v. *Georgia*.

Petitioner's claim that the erroneous exclusion of a *Witherspoon*-qualified juror on other grounds can never be harmless error is a direct application of this Court's decisions in *Gray* and *Davis*. Indeed, the entire argument is that, if harmless error analysis can uphold the erroneous excusal of a *Witherspoon*-qualified juror in a case like this, the gaping loophole thus opened would swallow up the *Gray* rule completely. Therefore, this case is not barred by the retroactivity doctrine of *Teague*.

By the same token, the *Gray* claim survives scrutiny under the AEDPA, because the Fifth Circuit's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law," as determined by this Court in both *Gray* and *Davis*. 28 U.S.C. § 2245(d)(1).

III. CONCLUSION

Petitioner respectfully requests that this Court issue a writ of certiorari and reverse the judgment of the Fifth Circuit or, alternatively, issue a writ of certiorari to review the judgment below on both issues herein presented.

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Respectfully submitted,

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